(12)

[illegible]

No. [illegible]

October Term, 1943.

[illegible]

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

# REPLY BRIEF FOR PETITIONERS.

[illegible]

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[illegible],
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[illegible]

Supreme

IN THE

# Court of the United States.

OCTOBER TERM, 1945.

No. 880.

HARRY J. AI
VIDUALLY AN
A. DUBAN, KER, JR., AND MAMIE DUBAN, INDI-
D AS EXECUTRIX OF THE ESTATE OF ALFRED
DECEASED,

*Petitioners,*

*v.*

FEDERAL D POSIT INSURANCE CORPORATION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT C URT OF APPEALS FOR THE THIRD CIRCUIT.

## PETITIONER'S REPLY BRIEF.

The respondent in its brief asserts that there was no important question of Federal law involved in this case and that this case is ruled by *D'Oench, Duhme & Company v. F. D. I. C.*, 315 U. S. 447. It further states it is the usual case of a debtor trying to escape liability by pleading a side agreement. (Respondent's Brief, p. 9.) But that is just where the respondent errs. The respondent has endeavored to fit the facts of this case into the *D'Oench, Duhme* case and they just do not fit. Never has there been a case of this type before this Court. All the previous cases, including the *D'Oench, Duhme* case, have had some sort of fraud, misconduct or illegality involved in them. The Court's attention is called particularly to the fact that in the *D'Oench, Duhme* case, the F. D. I. C. (respondent) had no knowledge of the agreement (the written receipts stating the note would not be called for payment, 315 U. S., 447, 454) until after demand for payment of the note was made. But in the case

now before the Court the respondent knew the petitioners claimed there was a special agreement as early as February, 1940, because in its letter of February 29, 1940, the respondent requested a copy of the agreement (Record, p. 223a, 224a).

In the *D'Oench, Duhme* case the agreement was an express attempt to avoid liability on the note. In the case now before the Court, however, *the debtor has made no effort to avoid liability.* He has paid all the interest to the date of sale, made payments on account of the principal and paid approximately $5,000. a year to maintain insurance for the benefit of the Respondent, and paid over all the fees as received, which were fees both due by the Commonwealth and other substantial clients. *The oral agreement in the case at bar merely fixed the maturity of the note.* This was evidenced by the fact that the trust company in 1936 arranged for the issuance of new insurance policies which did not expire until 1946, *thereby in accordance with the oral agreement fixing the maturity of the obligation in 1946.* Furthermore, there is no fraud or illegality in the present agreement, nor is there anything secret about it. The Century Dictionary defines "secret" as "concealed," "hidden," and "kept from the knowledge of others." No such situation existed here, and this was therefore not a secret agreement.

The decisions of the trial court and the Circuit Court of Appeals in this case are the result of a gross misapplication of the *D'Oench, Duhme* case. The Chancellor said "the evidence does not prove the existence of the oral contract alleged by the note." Record, p. 480 (A). But prior to that he said: "It may be conceded that as a result of the conversation described there was a satisfactory understanding that the loan and the collateral would not be disturbed . . ." Just what are the differences between "satisfactory understanding" and a "valid agreement" are difficult to conceive. An understanding certainly infers there

is an agreement, and one that is designated to be "satisfactory" even more so.

The misapplication of the *D'Oench, Duhme* case is further evidenced by the statement of the Circuit Court of Appeals in its opinion that "We will assume further there was a valid oral contract to this effect, and that Alker and DuBan did everything that was required of them by this contract." Record, page 558. The Circuit Court not only assumed there was an oral contract in this case, but even assumed that it was a valid one. In spite of this assumption the Circuit Court then ruled the contract was invalid, because it came within the *D'Oench, Duhme* case, *which was a clear case of fraud, and an attempt to avoid liability by what was a secret agreement.*

Furthermore, the respondent accepted all the benefits of this oral agreement from 1940 to 1943, with full knowledge of the agreement and acquiescence therein. No demand for payment was made until November 1942. If the respondent did not wish to be bound by the agreement, it should have repudiated it in 1940, and not have accepted the benefits until 1943. This it did not do as will clearly appear by the record.

The Respondent in its brief says: "In the case at bar, on the other hand the corporation is not suing as receiver nor is it relying upon the bank's right alone. It is suing as transferee for value without notice and consequently is entitled to recover."

As was demonstrated in petitioner's original brief, (pp. 27-29), Respondent, under the controlling Pennsylvania law, was not a holder in due course for value without notice in view of the long lapse of time between the execution of the note in 1936 and its negotiation to the Respondent in 1940.

The Court's attention is again called to the fact that this is a suit in equity instituted by petitioners; that Respondent's brief is in error where it states that the Respondent informed Alker at the start that it would not

be bound by the oral agreement (Respondent's Brief, p. 5); that the record shows that the assigned fees constituted not only fees due by the Commonwealth of Pennsylvania but also large fees by private clients; that the record shows the president of the Integrity Trust Company did discuss the agreement with the Examiner; and that the record shows the Trust Company placed on the 1936 note a special notation referring to the prior existing notes as to which the agreement was made.

If the present decision of the Circuit Court of Appeals is permitted to stand, the conduct of a profitable banking business will, in these days when the world moves fast and the banking business must do likewise, be rendered almost impossible, because every action will have to be in writing and brought to the attention of the Examiner, and the difficult burden will be placed upon every customer of a banking institution insured by the F. D. I. C. to see that every transaction he has with the bank is properly recorded and brought to the attention of the bank examiner, although it is a matter over which he has no control, and a thing he could not humanly do.

## Conclusion.

Wherefore, in view of the great confusion in these decisions and the gross misapplication of the *D'Oench, Duhme* case to the present one, it is submitted that there is an important federal question unsettled by this court and that the certiorari should be allowed.

Respectfully submitted,

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